Office-Supreme Court, U.S.
FILED
MAR 18 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1396

In the

Supreme Court of the United States

October Term, 1980

Jeanne Brandon, et al., *Petitioners.*

v.

The Board of Education of the Guilderland School District, et al., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Brief of Certain Law Professors as Amici Curiae in Support of the Granting of Certiorari

---

Attorney for Amici Curiae:
Theodore F. Zimmer
Adjunct Associate Professor of Law
Marquette University School of Law
780 N. Water
Milwaukee, Wisconsin 53202
(414) 277-5747

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iii

THE AMICI CURIAE.....1

INTEREST OF THE AMICI CURIAE.....5

STATEMENT OF THE CASE.....6

REASONS FOR GRANTING THE WRIT.....8

I. IN LIGHT OF PAST UNITED STATES SUPREME COURT DECISIONS REJECTING CONTENT-BASED RESTRICTIONS ON THE RIGHT OF FREE SPEECH, THE COURT OF APPEALS' DECISION SHOULD BE REVIEWED ON ITS MERITS.....8

II. IN LIGHT OF PAST UNITED STATES SUPREME COURT DECISIONS RECOGNIZING A STUDENT FORUM FOR POLITICAL EXPRESSION, THE COURT OF APPEALS SHOULD BE REVIEWED ON ITS MERITS..10

CONCLUSION.....16

TABLE OF AUTHORITIES

CASES

Chess v. Widmar,
--F.2d--, (8th Cir. 1980)
cert. granted sub nom. Widmar
v. Vincent, No. 80-689 (1981).....14-15

Cox v. Louisiana, 379 U.S. 536
(1965).....9,10

Food Employees v. Logan Valley
Plaza, 391 U.S. 308 (1969).....10

Goss v. Lopez, 419 U.S. 565
(1975).....13

Grayned v. City of Rockford,
408 U.S. 104 (1972).....9,14

Hague v. C.I.O., 307 U.S. 496
(1939).....10

Lemon v. Kurtzman,
403 U.S. 602 (1971).....9

Madison Joint School District
v. Wisconsin Employment
Relations Commission, 429 U.S.
167 (1976).....11

Police Dept. of Chicago v. Mosely, 408 U.S. 92 (1972).....8,11

Saia v. New York, 334 U.S. 558 (1948).....10

San Antonio School District v. Rodriguez, 411 U.S. 1 (1973).....10

Shuttlesworth v. Birmingham, 394 U.S. 147 (1969).....8

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).....11,12

Wood v. Strickland, 408 U.S. 508 (1974).....14

MISCELLANEOUS

Note, Challenging Ideological Exclusion of Curriculum Material: Rights of Students and Parents, 14 Harv. Civ. Rts-Civ. Lib. L. Rev. 485 (1979).....13

L. Tribe, American Constitutional Law (Foundation Press 1978).....12-13

THE AMICI CURIAE

Barbara Bader Aldave
Professor of Law
University of Texas
Law School
2500 Red River
Austin, Texas 78705

G. Sidney Buchanan
Professor of Law
University of Houston
Central Campus
Houston, Texas 77004

George Devlin
Professor of Law
Suffolk University Law School
11 Hilltop Road
Dover, Masschusetts 02030

John E. Dunsford
Professor of Law
St. Louis University School of Law
3642 Lindell Boulevard
St. Louis, Missouri 63108

Edward McGlynn Gaffney, Jr.
Associate Professor of Law
Notre Dame Law School
Notre Dame, Indiana 46556

Charles Kindregan
Professor of Law
Suffolk University Law School
41 Temple Street
Boston, Massachussets 02114

James M. McGoldrick
Associate Dean and Professor of Law
Pepperdine University School of Law
Pacific Coast Highway
Malibu, California 90265

John T. Noonan
Professor of Law
Boalt Hall School of Law
University of California
474 Boalt Hall
Berkeley, California 94720

Raphael J. Rabalais, Jr.
Associate Professor of Law
Loyola University School of Law
6333 Loyola Avenue
New Orleans, Louisiana 70118

Grover Rees
Assistant Professor of Law
University of Texas Law School
2500 Red River
Austin, Texas 78705

Peter W. Salsich, Jr.
Professor of Law
St. Louis University School of Law
3642 Lindell Boulevard
St. Louis, Missouri 63108

Basile J. Uddo
Associate Professor of Law
Loyola University School of Law
6333 Loyola Avenue
New Orleans, Louisiana 70118

Theodor F. Zimmer
Adjunct Associate Professor of Law
Marquette University School of Law
780 North Water Street
Milwaukee, Wisconsin 53202

INTEREST OF AMICI CURIAE

The law professors who appear as *amici curiae* on this brief do so to urge this Court to accept *Brandon* v. *Board of Education of Guilderland School District* for review because of the impact of the lower court's decision on traditional constitutional doctrine governing the right of free speech. By virtue of their profession, these *amici* have a unique interest in the preservation of a free and varied exchange of ideas and a clear and consistent statement of the law.

STATEMENT OF THE CASE

At the time this action was commenced, the petitioners were a group of high school students who sincerely believed that they should join together for daily communal prayer. In furtherance of their beliefs, they formed a voluntary organization known as the "Students for Voluntary Prayer" and sought permission from the respondents to use a room in their high school for their meetings. The meetings were to take place before the offical start of the school day and were to be held without any official school assistance, aid, supervision or participation. Despite repeated assurances that the meetings were to be completely separate from official school functions, that volunteer adults would be provided for purposes of supervision, if necessary, and that

attendance was entirely voluntary for any student who wished to attend, the respondents denied petitioners permission to use any part of the school property for their meetings. The reason given was that the use of public school property for the purposes contemplated by the petitioners would constitute an establishment of religion in violation of the First and Fourteenth Amendments to the Constitution. United States District Judge Neal McCurn granted summary judgment for the respondents, 487 F.Supp. 1219 (N.D.N.Y. 1980), and the Court of Appeals affirmed on the grounds that the meetings would "create an improper appearance of official support ...." (Petitioners' Appendix at A-16).

REASONS FOR GRANTING THE WRIT

The Court of Appeals decision in this case warrants review because of its impact on the doctrines of content-based restrictions and public forum which are applicable in free speech cases.

I. IN LIGHT OF PAST UNITED STATES SUPREME COURT DECISIONS REJECTING CONTENT-BASED RESTRICTIONS ON THE RIGHT OF FREE SPEECH, THE COURT OF APPEALS DECISION SHOULD BE REVIEWED ON ITS MERITS.

This Court has clearly and consistently rejected content-based restrictions on the right of free speech. The Court explained its position in its now classic statement in *Police Department of Chicago* v. *Mosly*, *408 U.S. 92 (1972)*:

"Once a forum is opened up to

> assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they say." *408 U.S. at 96.*

See also, Cox v. *Louisiana, 379 U.S. 536 (1965); Grayned* v. *Rockford, 408 U.S. 104 (1972).*

In this case, the issue of a content-based restriction *cannot* be resolved by the application of Establishment Clause analysis. Where the speaker is private and the message is religious, the tripartite test of *Lemon* v. *Kurtzman, 403 U.S. 602 (1971)* does not apply. Establishment Clause analysis is applicable only when the speaker is governmental. Here the speakers are clearly non-governmental; they are students. Indeed, the Court of Appeals was only able to perceive a "symbolic inference" of governmental involvement in religious activities. (App. A-15).

II. IN LIGHT OF PAST UNITED STATES SUPREME COURT DECISIONS RECOGNIZING A STUDENT FORUM FOR POLITICAL EXPRESSION, THE COURT OF APPEALS SHOULD BE REVIEWED ON ITS MERITS.

In the words of this Court, public fora are places such as "...streets, sidewalks, parks, and other similar places...so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely." *Food Employees* v. *Logan Valley Plaza, 391 U.S. 308, 315 (1969)(reversed on other grounds); See also, Hague* v. *CIO, 307 U.S. 496 (1939); Shuttlesworth* v. *Birmingham, 394 U.S. 147 (1969); Saia* v. *New York City, 334 U.S. 558 (1948).*

The essence of the concept of a public forum is equal access. As Justice Hugo Black stated in concurrence in *Cox* v. *Louisiana, supra,* "...if the streets

of a town are open to some views, they must be open to all." *379 U.S. at 580. See also, City of Madison Joint School District* v. *Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976).*

Courts will carefully scrutinze attempts to justify selective exclusions. *Police Department of Chicago* v. *Mosley, 408 U.S. at 98-99; See also, San Antonio School District* v. *Rodriguez, 411 U.S. 1, 16-17 (1973). Madison Joint School District* v. *Wisconsin Employment Relations Comm'n, supra.*

Although this Court has not squarely decided whether a public high school is or can be a public forum, it has decided that a public high school is an appropriate forum for political expression. *Tinker* v. *Des Moines School District, 393 U.S. 503 (1969).* In *Tinker*, the Court stated:

> "In our system, state-operated schools may not be enclaves of totalitarianism ...[Students] may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be continued to the expression of those sentiments that are officially approved." 393 U.S. at 511.

Whether a public high school is an appropriate forum for expression other than political expression was left undecided by the Court.

Subsequent to the *Tinker* decision, writers have commented on the nature of the forum recognized in that case. Professor Laurence Tribe in his recent treatise on constitutional law stated:

> "Public facilities like schools and libraries, created not primarily for public interchange but for purposes closely linked to expression,

> have been treated as semi-public forums, with government enjoying power to preserve such tranquility as the facilities' central purpose requires -- a power that would be denied in a true public forum -- but no power to exclude peaceful speech or assembly compatible with that purpose." L. Tribe, American Constitutional Law, at 689-90.

Another writer labelled this type of student forum a "limited forum." Note, Challenging Ideological Exclusion of Curriculum Material: Right of Students and Parents, 14 Harv. Civ. Rts. -- Civ. Lib. L. Rev. 485 (1979).

Adding to this lack of clarity as to the nature of the forum is a series of decisions by this Court recognizing other constitutional rights within the schoolhouse gate. *Goss* v. *Lopez* (*419 U.S. 565*

(1975)); *Wood v. Strickland*, *(408 U.S. 308 (1974))*. These cases raise even further questions as to which constitutional rights exist beyond the schoolhouse gate -- and the nature of those rights.

For example, this Court in *Grayned v. City of Rockford*, *supra*, as have other courts, federal and state, commented that "... *Tinker* made clear that school property may not be declared off limits for expressive activity by students...". In light of the decision below, your *amici* argue that *Tinker* did not make clear whether school officials may regulate, on the basis of content, what expressive activity is constitutionally permissible on school property.

Furthermore, the acceptance of *Chess v. Widmar*,- *F. 2d - (8th Cir. 1980)*,

cert. granted sub nom. Widmar v. Vincent, No. 80-689 (1981) for review and the rejection of *Guilderland* would leave unanswered the question raised in *Vincent* of whether the nature of the forum differs in the high school and college contexts.

CONCLUSION

For the reasons above, a writ of certiorari should issue to review the judgment of the Second Circuit Court of Appeals in *Brandon* v. *Board of Education of the Guilderland School District.*

Respectfully submitted,

/s/ Theodore F. Zimmer
Theodore F. Zimmer
Adjunct Associate Professor of Law
Marquette University Law School
780 North Water Street
Milwaukee, WI. 53202
(414) 277-5747

Counsel for Amici Curiae